



Republic of the Philippines
Commission on Elections
 Manila

EN BANC

**IN THE MATTER OF CLARIFYING THE
 OPINION OF THE LAW DEPARTMENT
 TO THE DRAFT CONTRACT FOR THE
 2014 EXTENSION TO THE WARRANTY
 PROGRAM (PROGRAM 1); REPAIR
 AND MAINTENANCE OF THE
 PRECINCT COUNT OPTICAL SCAN
 (PCOS) MACHINES**

BRILLANTES, SIXTO S. JR.	Chairman
TAGLE, LUCENITO N.	Commissioner
YUSOPH, ELIAS R.	Commissioner
LIM, CHRISTIAN ROBERT S.	Commissioner
PARREÑO, AL A.	Commissioner
GUIA, LUIE TITO F.	Commissioner
LIM, ARTHUR D.	Commissioner

Promulgated on: December 23, 2014

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RESOLUTION NO. 9922

This pertains to the Memorandum of the Law Department to Commissioner Christian Robert S. Lim (Comm. C.R. Lim), Chairperson of the Steering Committee dated November 4, 2014 which was elevated to the Commission *en banc* by the latter on November 6, 2014 regarding the Review of the Draft Contract for the 2014 Extension to the Warranty (Program 1); Repair and Maintenance of the Precinct Count Optical Scan (PCOS) Machines which stated, among other things, that "it behoves upon us to ensure that this Extension of Warranty (Program 1) for the repair and maintenance of the PCOS machines which is a clear example of Direct Contracting or Single Source Procurement, be made to undergo the test of validity under R.A. No. 9184."

The factual antecedents are as follows:

An Automated Election System (AES) will be implemented in the May 9, 2016 National and Local Elections in accordance with Section 6 of Republic Act No. 9369. In fact, the Commission on Elections (COMELEC) had already successfully used the AES for the May 10, 2010 National and Local Elections and the same AES was consequently used during the May 13, 2013 National and Local Elections using the Precinct Count Optical Scan (PCOS) machines which are already owned by COMELEC by virtue of an Option to Purchase (OTP) exercised by the poll body on March 30, 2012.

In the consolidated cases of *Capalla et. al. v. COMELEC et. al.*¹ the Supreme Court upheld the validity of the exercise of the OTP as it was an

¹ GR Nos. 20112, 201121, 201127 and 201413, June 13, 2012.

extension of the original AES contract and therefore, there was no need to publicly bid the same. As the PCOS machines were already used in the last two National and Local Automated Elections, the COMELEC—as the owner of the PCOS machines and as a public institution—is mandated and obligated to maintain and preserve public properties under its stewardship.

Further, the COMELEC Advisory Council (CAC) in its Resolution No. 2014-002 adopted last August 13, 2014 recommended, among other things, the re-use of the existing Optical Mark Reader Technology (OMR) pertaining to the PCOS machines owned by the COMELEC as the primary technology/voting system for the 2016 Elections. The poll body adopted the recommendation of the CAC in Minute Resolution No. 14-0621 dated August 29, 2014.

After exhaustive discussion and negotiation, the Smartmatic TIM (Smartmatic), the provider of the PCOS machines, submitted to the COMELEC *en banc*, through the 2016 Steering Committee, its Final Extended Warranty Proposal on October 27, 2014. Smartmatic committed to comply with the following additional terms and conditions of the COMELEC:

- a. *The warranties agreed under Articles 4 and 8 of the AES contract are in full force and effect; and*
- b. *The price for the parts, labor and technical support and maintenance is fixed at the prevailing market prices and for the periods stated in the submitted Final Extended Warranty Proposal;*

Also, Program 1 of Smartmatic's 2014 Extended Warranty, Proposal, reads:

"Since this program did not take place earlier this year, the 5 month program of work covered by this proposal will run into the start of 2015. Each of the PCOS machines will go through the program. During the 2014 extension to the warranty, we will:

- *examine every PCOS for the refurbishment required to bring them back to the working order after an extended period in storage and with no preventive maintenance,*
- *complete a full diagnostic on all the machines,*
- *perform a full preventive maintenance program,*
- *for minor repairs, those not needing parts, complete repair on the machines on all the PCOS, subject to the exclusions in the exclusions section below,*
- *where parts lead-time allows and up to a maximum of 4% of the units we will also repair any of the PCOS that require major repair, subject to the exclusions below."*

Smartmatic's Extended Warranty Proposal especially Program 1 was extensively discussed by the Commission *en banc* in a meeting held on October 28, 2014. In the said meeting, it was reiterated that the Commission had already given Commissioner C.R. Lim the authority to negotiate with Smartmatic. With this authority and with the understanding that the Program 1 of the Extended Warranty Proposal was already

approved during the said *en banc* discussion, Commissioner C.R. Lim proceeded with the contract negotiation with Smartmatic.²

In a Memorandum dated October 30, 2014, Comm. C.R. Lim forwarded the draft contract of the Extended Warranty Agreement (Program 1) to the Law Department for review. In its answer, the Law Department, in a Memorandum to the Steering Committee dated November 4, 2014, is of the opinion that nothing is wrong in resorting to "Direct Contracting" or "Single Source Procurement" which are allowed under Republic Act No. 9184 albeit under certain conditions such as:

- "1. Procurement of goods of proprietary nature which can be obtained only from the proprietary source, i.e. when patents, trade secrets, and copyrights prohibit others from manufacturing them;
2. When the procurement of critical component from a specific supplier is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of its contract; or
3. Those sold by an exclusive dealer or manufacturer which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the GOP."

On November 6, 2014, Commissioner C.R. Lim elevated the Memorandum of the Law Department to the *en banc* for further discussion.

The Commission *en banc* agrees with the opinion of the Law Department that the Extended Warranty Proposal for the refurbishment and/or repair of the PCOS machines should undergo the test of validity under R.A. 9184 and this Commission finds it both **legal and practical** to go to Direct Contracting instead of public bidding based on the following reasons:

Firstly, time is of the essence in the preparation for the May 9, 2016 National and Local Elections such that the Commission and the Bids and Awards Committee (BAC) are constrained by the tight time schedule if public bidding are to be conducted in the refurbishment and/or repair of the machines considering all the procurement activities lined up.

The Commission is already constrained to act within a tight time schedule for the procurement of election paraphernalia for the 2016 elections. Conducting a bid for the refurbishment and/or repair of the PCOS machines would entail unnecessary delay in the preparations for the 2016 Elections.

Due to the complex and highly technical nature of the refurbishment and/or repair of the machines—which might require other bidders to do reverse engineering—a conduct of a two-stage bidding process is highly

² TSN of *en banc* meeting held on October 28, 2014, pp. 8-9

probable. In a Memorandum of the BAC to the Commission *en banc* dated December 9, 2014, it submitted a timeline stating that a two-stage bidding needs eighty eight (88) calendar days to complete the process. If there is a failure of bidding, the BAC needs to repeat the whole process doubling the time needed. After two instances of failed biddings, only then is the Commission allowed to proceed to negotiated procurement.³

The refurbishment of the machines is already slated to start by March 2015. The Steering Committee in its Implementation Calendar requires at least eight months for the refurbishment of existing machines, and intends to start by March 2, 2015 and to end by November 30, 2015. The COMELEC Information Technology Department (ITD) has declared that it requires forty (40) days to inspect and diagnose the PCOS, and an additional two hundred (200) days to refurbish them.⁴

Note that it is already December and the BAC has a little more than sixty (60) days to conduct the bidding for the refurbishment and/or repair of the machines so the two-stage procurement is not within the timeline and even assuming that the BAC will adopt a single stage procurement, the time needed, which is fifty five (55) calendar days, is only sufficient to cover one cycle of the process—meaning, there is no room for failure which is very likely to happen.

It is glaringly evident that the remaining period of about sixty days before the March target date is terribly insufficient for the conduct of the two-stage bidding for the refurbishment and/or repair of the machines. Failed biddings must also be considered in calculating the time required, and would only further delay the schedule.

Moreover, there is only one BAC tasked to handle *all* procurement activities related to the election. These include the *Sangguniang Kabataan* procurement scheduled for February 2015 and the regular procurement aside from and the procurement of the DRE, the additional OMR and all other election paraphernalia for 2016. The bidding for the refurbishment and/or repair of the PCOS machines, which is no longer necessary given the exemptions under Rep. Act. No. 9184, will only impede other procurement activities and impair the efficiency of the BAC.

All these circumstances will most definitely delay the preparatory activities of the Commission and the BAC. This Commission would not want to risk not being able to complete all preparatory activities on the basis of unseen logistical problems for fear of not being able to hold the elections on the prescribed date. A worse scenario would be reverting back to manual elections if only to meet the prescribed election date.

Additionally, one may begin to ask why the Commission did not start the bidding earlier in order to allow more time for the procurement process. Note that when the Commission started discussing the technology to be used for the May 9, 2016 Election, we had in mind that

³ Rep. Act. No. 9184, §53.1.

⁴ Memorandum addressed to Commissioner Al A. Pareño dated 5 Dec. 2014.

we will be using an all new technology so that the refurbishment and/or repair of the existing machines are out of the question. However, when we submitted our proposed budget to the Department of Budget and Management (DBM), the DBM's recommended budget to the Congress took into consideration, the re-use of the existing machines. Moreover, the recommendation of the CAC for the re-use of the existing OMR only came on August 13, 2014 which was consequently adopted by the Commission *en banc* only on August 29, 2014. Meanwhile, the COMELEC had to defend the budget at Congress hearings. The Lower House approved the Commission's budget on October 28, 2014 while the Senate approved the budget on December 1, 2014. Had it not for the budget given and the CAC recommendation, the Commission would have opted for an all new machines and the refurbishment and/or repair of the old machines would not be an issue. Also, the Commission had to wait for the approval of both houses of the Congress of the budget which came in only on October 28 and on December 1.

Secondly, to give the refurbishment and/or the repair of the PCOS machines to any third party provider other than Smartmatic, the original manufacturer will be too great a risk considering the highly technical nature of the refurbishment and/or the repair to be conducted on the machines.

If the COMELEC would allow third parties other than Smartmatic who manufactured the PCOS machines to refurbish and/or repair the machines, there is a dangerous risk of damaging the integrity of the system as the third party provider may not be able to fully refurbish and/or repair the machines because the workings and technology of the machines are not familiar with them.

The third party provider who will be tasked to refurbish and/or repair the PCOS machines might necessitate to reverse engineer them in order to have a knowledge on how the machines work and operate as it is not the manufacturer of the said machines. To reverse engineer according to the Merriam Webster Dictionary is "to disassemble and examine or analyze in detail (as a product or device) to discover the concepts involved in manufacture usually in order to produce something similar."

In other words, if a third party provider is to reverse engineer the PCOS machines, there is a need for it to study them but there is no guarantee if it can actually reverse engineer the machines and the technology behind it.

According to Undersecretary Louis Napoleon C. Casambre, Chairperson of the CAC, during a meeting with the Steering Committee on August 20, 2014, although reverse engineering is feasible, doing so will put everything "back to zero" such that "the know-how that the COMELEC had accumulated will be invalidated."

In the process, this poses a greater risk for COMELEC to give the refurbishment and/or repair to another provider other than manufacturer of the PCOS machines. We cannot take the very arduous repercussion of

jeopardizing the 2016 National Elections due to this non-assurance that if we will go to public bidding, the winning bidder can actually do the reverse engineering to the machines.

Even assuming that the third party provider other than Smartmatic is able to reverse engineer the machines, the third party provider might deem it necessary to also reverse engineer the software. If this happens, the new software is required to undergo another certification by a third party entity like the SLI Global Solution which will take around a period of six (6) months. The certification alone will take time and will result to a serious delay in the timeline for the 2016 National and Local Elections.

In addition to these, if the PCOS machines malfunction during Election Day, it will be very difficult for COMELEC to determine as to whom it will hold accountable for the cause/s of the malfunctioning. The third party provider and Smartmatic will definitely point fingers at each other as to whose fault it is. In the end, it is COMELEC that will ultimately suffer the ramifications of the risk involved.

Thirdly, given that no public bidding will be conducted, it is still legal under R.A. 9184 for the COMELEC to resort to direct contracting in the present case.

The Extended Warranty Contract meets the requirements of the procurement law on direct contracting.

Reference is made to the Memorandum dated November 4, 2014 from the Law Department which reviewed the Draft Contract for the 2014 Extension to the Warranty (Program 1); Repair and Maintenance of the Precinct Count Optical Scan (PCOS) Machines. Therein, it was opined that the subject services being procured, notwithstanding their designation as "*Extension of Warranty (Program 1) for the repair and maintenance of PCOS machines*", still falls within the purview and ambit of RA 9184 or the Government Procurement Reform Act as "Direct Contracting" or "Single Source Procurement". Direct Contracting is defined under said Act as "a method of procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations."⁵

Therefore, the subject contract must comply with Section 50 of RA 9184 which allows direct contracting only in any of certain enumerated conditions, namely:

- (a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same item;
- (b) When the procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or,

⁵ Sec 48 (b), RA 9184

- (c) Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the Government.

After a careful study of the matter on hand, we determine that the subject contract falls under any and all of the aforementioned conditions, such that:

- I. The goods procured are of proprietary nature, which can be obtained only from the proprietary source of the PCOS licensed technologies and from the exclusive manufacturer, which in the case of the PCOS is Smartmatic.***

The AES supplied by Smartmatic incorporated proprietary licensed technology provided on industry standard terms.

Both Smartmatic and Dominion have confirmed, in their respective communications to the COMELEC, the conclusion of the negotiations between Smartmatic International Corp. and Dominion Voting Systems International Corp., as well as the settlement of the Delaware litigation between them. Both parties confirm that the settlement and the new license agreement between them provide that Smartmatic will have **exclusive full and unencumbered access** to the Licensed Technology for use in the Philippines including the latest Philippines PCOS source code, for modification, review purposes, certification and trusted build.

The proprietary nature of the subject goods, to which Smartmatic has exclusive access in the Philippines, is further underscored by various intellectual property documents and certifications for the licensed technology covered by the Smartmatic-Dominion agreement such as US Patent No. US 8,195,505 B2 for "System, Method and Computer Program for Vote tabulation with an Electronic Audit Trail"; Certificate of Registration No. TX 7-921-024 "Democracy Suite Election Management System Software version 4.14" and the Certification of Intellectual Property Rights Ownership and Distributorship from Smartmatic International for PCOS machines acquired by COMELEC.

- II. The procurement of critical component of the AES solution from Smartmatic TIM is a condition precedent to hold it to guarantee the project performance in accordance with the provisions of the contract.***

The Extended Warranty Contract is consistent with the 2009 AES Terms of Reference, the 2012 AES Contract and the Supreme Court decision in the consolidated cases of *Capalla et al. vs. COMELEC et al.*, which affirmed the validity of the 2012 Deed of Sale for the exercise of the OTP without undergoing another bidding process. Hence, it is merely a continuation of the previous agreement and the warranty on the machines;

performance depends on Smartmatic supplying the components and parts.

It is very much possible that Smartmatic will not take responsibility for malfunctioning machines tampered by other entities, or with which such other entities have been otherwise involved. Hence, it appears that allowing other entities than the manufacturer Smartmatic to maintain, replace or otherwise meddle with the machines would put in jeopardy the integrity of the entire system and the PCOS machines; hence, may void the warranty under the original agreement.

Furthermore, the software and firmware performance of the machines is linked to the quality components used by Smartmatic and any changes to those components could impair the operation of the PCOS and would require software recertification. The drivers and controllers of the PCOS are hard coded into the source code. The PCOS software does not work like a standard computer where drivers can be installed and downloaded independently from the applications used. Any change in hardware that does not come from the appropriate origin will trigger a change in the different layers of software (drivers, voting application, transmission applications, security applications) resulting in a change of the source code.

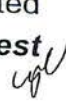
If a different provider changes even one single component in the machine, the source code of the PCOS will have to be updated, which will render the certification of the compiled software void, requiring a new process of certification.

Finally, allowing other entities to tamper with the PCOS may compromise the security features that Smartmatic has built into the system by making them widely known.

III. The PCOS is exclusively manufactured in the Philippines by Smartmatic, which does not have sub dealers and there is no direct substitute for the product.

Smartmatic is the exclusive manufacturer of the PCOS, using its own proprietary hardware and software and the exclusive licensing made available from Dominion. Its authorizations include the exclusive use of the licensed patent rights covering or relating to the licensed technology (hardware and software) in the Philippines. Even Dominion does not have the right to provide its licensed technology within the country.

Lastly, the proposed extended warranty that is a part of the 2009 AES contract—which was a product of a validly conducted public bidding—is still valid and enforceable.

This Commission conducted the bidding for the PCOS machines, the Election Management System (EMS), and the Consolidated Canvassing System (CCS) in 2009. Smartmatic emerged as the **lowest** 

qualified bidder, having complied with all the requirements of the Government Procurement Reform Act,⁶ and submitted the lowest bid within the Commission's Approved Budget for the Contract (ABC). The Commission awarded the contract to Smartmatic on June 9, 2009.⁷

The 2009 AES contract contained an OTP clause for the subsequent acquisition of the PCOS machines, which the Commission exercised in March 2012.⁸ No public bidding was conducted for the acquisition of the PCOS machines by virtue of the OTP clause as upheld in the case of *Capalla et al. v. COMELEC et al.* wherein the Court declared that the OTP was merely a component of the 2009 AES Contract, and its fulfillment formed part of the terms previously agreed upon by COMELEC and Smartmatic. Since the contract was still in effect, there was no need to subject the procurement to a new bidding process.

The Court categorically stated that Smartmatic was not granted additional rights that were not previously available to the other bidders. The AES contract was awarded to Smartmatic after compliance with all the requirements of a competitive public bidding.

It should be noted that COMELEC exercised the OTP subject to the following conditions:

- (1) **The warranties agreed upon in the AES contract shall be in full force and effect;**
- (2) The original price for the hardware and software covered by the OTP as specified in the AES contract shall be maintained, excluding the cost of the 920 units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and
- (3) The other services related to the 2013 AES shall be subject to public bidding. (*Emphasis added*)

It is exactly this warranty under condition no. 1 that the COMELEC is seeking to enforce through the proposed extended warranty. At the time the Commission issued Resolution No. 9376⁹ exercising the OTP, it intended for the warranty to be existing and enforceable. Had the warranty not been included in the OTP contract, COMELEC would not have pushed through with the purchase.

As such, the proposed Extension of the Warranty is but a performance of an already existing obligation of Smartmatic-TIM to COMELEC covering the maintenance and repairs of the very same machines that were leased in 2009, and subsequently purchased in March 2012. The Commission itself made it a requisite that the warranties over

⁶ Rep. Act. No. 9184.

⁷ Resolution No. 8608.

⁸ Resolution No. 9376.

⁹ Dated 21 Mar. 2012.

the PCOS units would still be enforceable under the OTP Contract. In the same vein, because the same machines are involved, it is only logical that they be considered as covered by the same warranty, albeit under an extended time period.

NOW, THEREFORE, the Commission on Elections, by virtue of the powers vested in it by the Constitution, the Omnibus Election Code, Republic Act No. 9369 and other election laws **RESOLVED**, as it hereby **RESOLVES**, to APPROVE Smartmatic TIM's PCOS Extended Warranty Proposal (Program 1) amounting to Three Hundred Million Pesos (Php 300,000,000.00) exclusive of Value Added Tax (VAT) through Direct Contracting; **RESOLVED FURTHER**, to let the Steering Committee implement this Resolution.

SO ORDERED.

SIXTO B. BRILLANTES, JR.
Chairman

To push thru w/ the public bidding will greatly affect our timeline
LUCENITO N. TAGLE
Commissioner

ELIAS R. YUSOPH
Commissioner

CHRISTIAN ROBERT S. LIM
Commissioner

See Separate Opinions
AL A. PARREÑO
Commissioner

Pls see my dissent
LUIE TITO F. GUIA
Commissioner

ARTHUR D. LIM
Commissioner

I opt for public bidding if the timeline will allow it being, in my view, the safest course of action to take conformably with R.A. No. 9184. See separate opinion.

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Republic of the Philippines
Commission on Elections
Manila

EN BANC

IN THE MATTER OF CLARIFYING THE OPINION OF THE LAW DEPARTMENT TO THE DRAFT CONTRACT FOR THE 2014 EXTENSION TO THE WARRANTY PROPOSAL (PROGRAM 1); REPAIR AND MAINTENANCE OF THE PRECINCT COUNT OPTICAL SCAN (PCOS) MACHINES.

BRILLANTES, SIXTO S. JR.
TAGLE, LUCENITO N.
YUSOPH, ELIAS R.
LIM, CHRISTIAN ROBERT S.
PARREÑO, AL A.
GUIA, LUIE TITO F.
LIM, ARTHUR D.

Chairman
Commissioner
Commissioner
Commissioner
Commissioner
Commissioner

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Promulgated on: December 23, 2014

SUMMARY OF VOTES

After the deliberation of the Commission *en banc* on the above-captioned subject, the members of the *en banc* voted as follows:

Four (4) members voted to APPROVE Smartmatic TIM's PCOS Extended Warranty Proposal (Program 1).

Commissioner Al A. Parreño in his Separate Opinion joined the majority, stating that an alternative mode of procurement is justified subject to the condition that it must be done pursuant to existing laws and jurisprudence.

Although denominated as a Separate Opinion, Commissioner Arthur D. Lim's opinion appears to be more of a dissent, qualifying his vote that he "opts for public bidding if the timeline will allow it being, in my view, the safest course of action to take conformably with R.A. No. 9184."

Commissioner Luie Tito F. Guia dissents.

Therefore, the vote on the subject of Smartmatic TIM's Extended Warranty Proposal (Program 1) is 5-2.

FOR THE COMMISSION:

SIXTO S. JR. BRILLANTES, JR.



Republic of the Philippines
COMMISSION ON ELECTIONS
Intramuros, Manila

EN BANC

IN THE MATTER OF CLARIFYING
THE OPINION OF THE LAW
DEPARTMENT TO THE DRAFT
CONTRACT FOR THE 2014
EXTENSION TO THE WARRANTY
PROGRAM (PROGRAM 1); REPAIR
AND MAINTENANCE OF THE
PRECINCT COUNT OPTICAL SCAN
(PCOS) MACHINES

X-----X

Promulgated: December 23, 2014

SEPARATE OPINION

Pursuant to the submitted time schedule for the award of the 2014 Extension to the Warranty Program ("Extended Warranty Contract"), what is the Commission's best recourse to ensure compliance with its constitutional duty of holding the 2016 elections?

Under the Constitution, the Commission is tasked to enforce and administer all laws relative to the conduct of elections. To carry out this constitutional mandate, it is the Commission's responsibility, given the facts given at present, to take all proper measures and to exercise good judgment to ensure the timely conduct of the 2016 elections.

In the Separate Opinion of Chief Justice Maria Lourdes P. A. Sereno in *Capalla vs. COMELEC*,¹ she stressed that "while procurement laws seek to prevent abusive exercise of discretion, they do not unreasonably require government agencies to abandon their duty to exercise care and good judgment."² In confirming the validity of the Deed of Sale between the Commission and Smartmatic, which did not go through public bidding, Chief Justice Sereno held that to purchase the PCOS machines was "actually an

¹ G.R. No. 201112, June 13, 2012.

² *Ibid.*

exercise of sound discretion afforded to the COMELEC to implement our electoral laws, given the limited circumstances and the viable options open to it at that time.”³

In this case, given that the Commission’s Bids and Awards Committee (“BAC”) and Information Technology Department (“ITD”) have submitted the time constraints to the Commission, failure to take affirmative action will carelessly delay or prevent the holding of elections.

In light of the considerations regarding the timeline as forwarded to the Commission, the Commission was presented with the lack of, or at the least very limited, time to effect a full blown bidding for the 2016 elections.

In the Separate Opinion of Associate Justice Presbitero J. Velasco, Jr. in *Capalla vs. COMELEC*,⁴ he laid down the circumstances that would justify the Commission’s application of alternative method of procurement, thus:

“As a matter of practical convenience, courts of law have applied laws in a manner that would avoid consequential mischief. The failure of our elections or a reversion to the snail-paced and problem-laden manual method of election will not only be a mischievous, but a disastrous, consequence, if this Court shall refuse to recognize that, given the time and the budget for the 2013 elections, no supplier can provide a suitable substitute for the Smartmatic-TIM AES at more advantageous terms to the government so that the COMELEC’s application of the allowed alternative method of procurement is justified.”⁵

From the foregoing, the requisites are: (1) the Commission is faced with time, budgetary and other logistical constraints; and (2) compliance with the procurement laws will consequently result in failure of elections.

In the instant case, the timeline is too restrictive based on the assessment of the Commission’s Bids and Awards Committee (“BAC”) and Information Technology Department (“ITD”). For another, the 2016 Elections is already nearing and failure to take

³ *Ibid.*

⁴ G.R. No. 201112, October 23, 2012.

⁵ *Ibid.*

preparatory action now will carelessly and neglectfully expose the country to failure of elections.

Given the very limited time and other constraints, the requirements of procurement laws and the more supreme constitutional endeavor of the Commission to conduct elections must be balanced.

Furthermore, if the Commission finds that conformity with RA 9184 is an impractical, if not impossible, recourse, public bidding can be dispensed with pursuant to the Omnibus Election Code.

Section 52 of the Omnibus Election Code provides:

"Sec. 52. Powers and functions of the Commission on Elections. - In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections, and shall:

xxx

(h) Procure any supplies, equipment, materials or services needed for the holding of the election by public bidding: Provided, That, if it finds the requirements of public bidding impractical to observe, then by negotiations or sealed bids, and in both cases, the accredited parties shall be duly notified."⁶

To validly dispense with the requirement of public bidding, the conditions are: (1) the requirements of public bidding are impractical to observe; (2) procurement should be through negotiations or sealed bids; and (3) the Commission must notify the accredited parties.

As discussed above, the Commission is notified of the time constraints, risks, issues and other contingencies needed if it pursues public bidding. Even assuming that the bidding process is perfect with not a single day of delay, there are then subsequent production issues related to personnel, processes, production, materials, methods software and quality assurance. Included herein are those related to the training and learning curve of personnel, reverse engineering, quality risks, setting up of production site and machinery,

⁶ Art. VII, Sec. 52 (h), Omnibus Election Code.

development of processes, sourcing and testing of materials, crashing of processes and other risk mitigating requirements. All in all, the issues associated with public bidding and subsequently setting up an entirely new complex production in a limited time frame as submitted to the Commission, exposes the Commission to a high probability of failure.

This opinion also recognizes the proprietary nature of the relevant goods and corresponding legal discussion related thereto as discussed in the main opinion. Likewise, this opinion recognizes the discussion in the main opinion related to the procurement of the AES solution as a condition precedent to hold it to guarantee the project performance. This opinion also adopts the discussion regarding the exclusive distributorship of Smartmatic. Further to the discussion regarding the extended warranty being part of the AES contract, we also note that the warranty conditions, which the Extended Warranty Contract seeks to enforce, is an ancillary provision in the subsisting valid contracts.

The proposed extended warranty is an enforcement of an implied warranty provided under Article 1562 of the Civil Code. Pursuant to said provision, in a sale of goods, there is an implied warranty as to the quality and fitness of the goods during the intended lifespan of the goods.

Furthermore, considering that the warranty provisions are part of the contractual provisions of both parties, the Commission is bound to observe the limitations of warranties embodied therein, otherwise the warranty shall be voided.⁷

Section 8.5 of the AES Contract provides:

“8.5 Limitations of Warranties. The warranty obligation of the PROVIDER shall not extend to:

(a) Equipment the serial number, model number or any other identification, marking, and security seal of which has been removed or rendered illegible by COMELEC personnel, without any authority from the PROVIDER or its technical personnel;

(b) Equipment that has been damaged by malicious misuse, accident or force majeure;

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Sec. 8.5, Automated Election System Contract.

(c) Equipment the selected component of which has been opened without the PROVIDERS's prior written approval; or

(d) Equipment wherein COMELEC or its agents have made changes to its physical, mechanical, electrical, software or interconnection components without written authorization of the PROVIDER."⁸

Based on the foregoing limitations, to allow other entities, including the Commission's Information Technology Department, without written authorization from Smartmatic shall void both the express warranty provided in the contract and the implied warranty provided under the Civil Code.⁹

It must underscored that the most patent basis for holding a provider liable for defective products is through enforcement of warranty provisions of a contract. Considering that contracts take effect only between the parties,¹⁰ enforcement of warranty provisions cannot be extended to parties not part of the contract. Thus, in case of defects in the PCOS machines, the Commission is grossly disadvantaged since it cannot proceed against the warranty, making Smartmatic and the third party provider free from liability.

In view of the foregoing, the discussions laid down in the majority opinion, the facts, issues and opinion given to us and the options laid down as of the writing of this opinion, an alternative mode of procurement is justified. However, in the interest of fairness and transparency, I submit that it be done pursuant to existing laws and jurisprudence including the following: (1) the contract should be awarded through negotiations or sealed bids; (2) accredited parties should be notified; and (3) the Commission, through the Transparency Committee, should device adequate safeguards to prevent corruption and ensure transparency.


AL A. PARRENO
Commissioner

⁸ *Ibid.*

⁹ *Id.*

¹⁰ Art. 1131, Civil Code of the Philippines.

Republic of the Philippines
COMMISSION ON ELECTIONS
 Intramuros, Manila

EN BANC

IN THE MATTER OF CLARIFYING
 THE OPINION OF THE LAW
 DEPARTMENT TO THE DRAFT
 CONTRACT FOR THE 2014
 EXTENSION TO THE WARRANTY
 PROGRAM (PROGRAM 1); REPAIR
 AND MAINTENANCE OF THE
 PRECINCT COUNT OPTICAL SCAN
 (PCOS) MACHINES

Brillantes, S.S. Jr., *Chairman*
 Tagle, L.N., *Commissioner*
 Yusoph, E.R., *Commissioner*
 Lim, C.R.S., *Commissioner*
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 Guia, L.T.F., *Commissioner*
 Lim, A.D., *Commissioner*

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Promulgated: December 23, 2014

SEPARATE OPINION

The issue of how to legally and efficiently repair and maintain this Commission's Precinct Count Optical Scan (PCOS) machines in preparation for the May 09, 2016 National and Local Elections (NLE) is crucial and demands no less than close scrutiny by the Commission *En Banc*.

Doubtless this Commission is bound by the provisions of the Government Procurement Reform Act. Thus, all its procurement should be done through public bidding, save for exceptions provided therein and in its Implementing Rules and Regulations.

I agree with the Law Department's recommendation in its November 04, 2014 Memorandum that should the following circumstances be present, the Commission *En Banc* may **not** engage in Direct Contracting or Single Source Bidding with Smartmatic-TIM:

"1. Smartmatic-TIM is not the only entity capable of conducting such Refurbishment/ Preventive Maintenance/ Extended Warranty/ Program Updates of the PCOS Machines, or if the ITD is determined to possess the capability to conduct the same, dispensing the need for outsourcing of services;

2. The goods and services being offered, necessarily including the software or hardware components of said system,

taken independently or as a whole integral system, is bereft of proprietary rights duly registered under laws or otherwise registered with the appropriate Intellectual Property Office;

3. The goods and services offered is not a critical component of the PCOS machines and the procurement of said goods or services is not highly exceptional; or

4. otherwise not offered or sold with exclusivity by Smartmatic-TIM which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the GOP."

I agree with the Law Department that all means must be exhausted in order to ensure that the contract for the repair and/or refurbishment of our PCOS machines are fully compliant with the procurement law.

The Resolution of the Commission *En Banc*, on the other hand, recognizes the extraneous factors present regarding the repair and/or refurbishment of the machines vis-à-vis the conduct of the May 09, 2016 NLE. The major concern in this regard is that the tight timeline for public bidding will constrain the preparations for the May 09, 2016 NLE.

With the benefit of hindsight, given that the Congress did not approve the Commission's proposed Php 26 Billion budget for CY 2015, thereby rendering impossible the then planned purchase of all brand new PCOS for the May 09, 2016 NLE, would it have made a difference if preparatory activities had been undertaken right away on the anticipation that said proposed budget would not be approved as a matter of course and we would have to use the existing machines for the May 09, 2016 NLE? Was it necessary to await the Department of Budget and Management's (DBM) recommendation on the budget and that of the COMELEC Advisory Council (CAC) which came only in August 2014 before undertaking the preparatory activities?

It must be also noted that the fact that there may not be sufficient time to conduct public bidding is **not** among the circumstances that will allow resort to an alternative method of procurement.

The Resolution also cited the risk of contracting a third-party provider considering the highly technical nature of the refurbishment and/or repair to be conducted. In my opinion, such risk is properly



addressed in a public bidding, where interested providers will be able to show how they will conduct the repair, and the Commission will be able to determine if such repair will be timely, efficient, and advantageous to the Government. This argument also immediately assumes that Smartmatic-TIM will not win in the public bidding, something that appears to be premature at this point.

The Resolution also explained how the Extended Warranty falls under the circumstances which allow Direct Contracting/ Single Source Bidding.

To be clear, the subject of this contract is the refurbishment/repair service of the PCOS machines, and not the machines themselves. Thus, the first circumstance is not applicable to this case. The service of repairing and refurbishing of the machines is not subject to any patent or copyright. Instead, it is the Automated Election System itself that incorporated proprietary licensed technology.

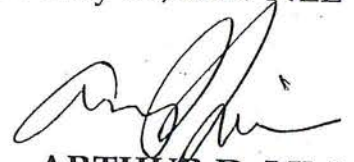
On the third circumstance, the Resolution states that the PCOS is exclusively manufactured in the Philippines by Smartmatic-TIM and that there is no direct substitute for the product. Again, this is not to be confused with the service of repairing and/or refurbishing said machines. If a public bidding is to be conducted, it is the latter that will be procured, and not the machines.

Lastly, the Resolution states that the Extended Warranty is but a performance of an existing obligation, and that this warranty is still covered by the 2009 AES Contract.

Be that as it may, the Extended Warranty still entails quite a sizeable cost to this Commission, Php 300 Million to be precise. I believe that a public bidding, provided that alternative methods of procurement cannot be resorted to, is the way to determine whether this cost is truly advantageous to the Government, or if there are other cost-effective measures present in order to repair or refurbish our PCOS machines.

I have qualified my signature in the Resolution, thusly: "*I opt for public bidding if the timeline will allow it being, in my view, the safest course of action to take conformably with R.A. No. 9184.*" This was both to assert a legal argument and to recognize that a pragmatic approach cannot now be avoided if it be true that the timeline is too restrictive

such that a public bidding will only serve to derail, delay or cancel out the holding of the May 09, 2016 NLE. We certainly cannot afford to usher in chaos or a revolutionary situation if the May 09, 2016 NLE would not push through.



ARTHUR D. LIM
Commissioner



Republic of the Philippines
Commission on Elections
 Manila

EN BANC

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 OF THE LAW DEPARTMENT
 TO THE DRAFT CONTRACT
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DISSENTING OPINION

At the core is the issue of whether the maintenance, diagnostics and repair (minor) of the Precinct Count Optical Scan (PCOS) machines to be used in the May 2016 National and Local elections, and now owned by the Commission, should be procured via competitive public bidding provided under Republic Act No. 9184,¹ otherwise known as the Procurement Act. The Law Department of this Commission opined in a *Memorandum* dated 4 November 2014 that this should be the way to go upon determination of the following conditions:

a. Smartmatic is not the only entity capable of conducting such Refurbishment/Preventive Maintenance/Extended Warranty/ Program updates of the PCOS Machines, or if the ITD is determined to possess the capability to conduct the same, dispensing the need for outsourcing of services;

b. the goods and services being offered, necessarily including the software or hardware components of said system, taken independently or as a whole integral system, is bereft of proprietary rights duly registered under laws or otherwise registered with the appropriate Intellectual Property Office; or

c. the goods or services offered is not a critical component of the PCOS machines and the procurement of said goods or services is not highly exceptional; or

d. otherwise not offered or sold with exclusivity by Smartmatic which does not have sub-dealers selling at lower

¹ An Act Providing for the Modernization, Standardization, and Regulation of the Procurement Activities of the Government and for Other Purposes, [GOVERNMENT PROCUREMENT REFORM ACT], Republic Act No. 9184 (2003).

prices and for which a suitable substitute can be obtained at more advantageous terms to the GOP;

The alternative, which is the mode preferred by the majority, is for this Commission to avail of, and to implement the *Extended Warranty* provision in the original 2009 contract between the Commission and Smartmatic-TIM. Under the *extended warranty* mode, the Commission will directly contract out the diagnostics, maintenance and minor repair of the machines to Smartmatic-TIM as part of the 2009 AES contract. This dispenses with the requirement of public bidding.

In rationalizing its preference for the *extended warranty* mode, the majority relies heavily on the tight timeline of the preparatory activities for the elections. It cited the certifications of the Information and Technology Department (ITD) and the Bids and Awards Committee (BAC) indicating that the bidding process as well as the actual maintenance, diagnostics and minor repair, and the refurbishment work would take more than a year. It is therefore implied from this assumption that there might not be enough time to undertake all the other mandatory processes like testing and certification of the system, and to address other logistical concerns if open competitive bidding is resorted to.

The majority also cites the claimed exclusive property rights of Smartmatic-TIM over the various parts and software of the machines, implying that it is far too risky for the Commission to allow other technology providers to undertake the maintenance and repair, as well as the refurbishment of the machines.

With due respect, I have a different view and appreciation of the matter.² The maintenance, diagnostics and repair of the PCOS machines should be done in-house by the Commission's ITD personnel. It is assumed that after two automated elections the personnel of the Commission should have already acquired the necessary knowledge, skill and expertise to perform basic maintenance, diagnostic and repair works on the PCOS machines. Surely, transfer of technology is one important consideration that the Commission had, or should have had, in deciding to purchase the automated election system. There is an obvious imperative for the Commission, as the office mandated by the constitution to conduct electoral exercises, to ensure that our elections are not dependent on private technology providers for the basic repair and maintenance of voting or counting machines procured.

Should the in-house ITD personnel be unable to perform the repair, however, the only available procurement methods the Commission can resort to would be those provided in the Procurement Act. Having concluded, though, that open competitive bidding is time consuming, impractical and would produce too much risk, the majority argues that existing conditions and the *extended warranty* provisions in the 2009 contract allow the Commission to

² The majority opinion mentioned the approval of a resolution during a Commission *En Banc* meeting on 28 October 2014. In said meeting I expressed my strong reservation and concern on the legality and wisdom of awarding the maintenance and diagnostics contract to Smartmatic-TIM. I reiterated said reservation in my subsequent conversation with Commissioner Christian Robert S. Lim. The opinion of the Law Department, subsequently issued in the 4 November 2014 *Memorandum*, firmed up my decision not to go with majority's preference.

undertake alternative procurement mode like direct contracting or single source procurement.

However, I am not convinced that resort to alternative procurement is fully justified at this point. In determining whether the conditions for direct contracting were met, the majority placed great weight on the representations of Smartmatic-TIM in the documents it recently furnished to the Commission. Having been sourced solely from Smartmatic-TIM, the representations given are at best self-serving. The claims need to be independently verified. Otherwise, it cannot give the Commission sufficient basis and legal justification to resort to alternative modes of procurement.

In addition, the Commission's BAC in its *Memorandum* dated 20 May 2014 found that direct contracting cannot immediately be resorted to:

After our perusal of the said underscored provisions in the AES RFP and Contract, this Committee **finds that the said quoted provisions do not sufficiently support a recommendation to immediately resort to Direct Contracting**. The warranty mentioned in the said documents was merely an assurance on the availability of parts, labor and technical support to the Comelec but it did not mention the following:.....

The BAC further quoted a GPPB Non-Policy Opinion, to wit:

The procuring entity must first justify the necessity for purchasing patented goods and it must be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms, before it may decide to procure through Direct Contracting (GPPB NPM 042-2012).

As stated above, the representations and the veracity of the information supplied by Smartmatic-TIM need to be independently verified in order for us to obtain the necessary justification to depart from the default mode of procurement. The Php300,000,000.00 contract is too substantial an amount for us to readily accept the representations of the Smartmatic-TIM and abandon the option of public bidding.

Thus, open competitive bidding remains to be the best option for this Commission after in-house repair. Not only does it ensure that the law is observed, it also affords the Commission the opportunity to obtain lower prices for the services or products being procured. Moreover, questions on the identity, reputation and the capability of all prospective bidders are placed under public scrutiny. Public bidding ensures competitiveness by leveling the playing field amongst parties who are interested, eligible and qualified to participate. Instead of negotiating with a single supplier offering a more or less inflexible price, the Commission and the public would be better benefitted if more than one party is allowed to offer competitive prices. The possibility of control of a single supplier to the price and conditions of the contract is also diminished.

The majority invokes the tight timeline of the preparatory activities in its preference to implement the *extended warranty* and the alternative mode of procurement. Indeed, timelines are important especially in preparing for an

election with a fixed date. Equally important, however, is public trust and the credibility of the electoral process. Transparency is key to gaining public trust and confidence in elections. Public bidding affords the public the opportunity to observe the procurement phase of election preparation. Certainly, a credible procurement procedure brings about more trust and confidence in the electoral process itself, which in turn, results to better public acceptance of election results.

Finally, timelines are actually just planning tools intended to assist in ensuring that deadlines of activities in a project are met. *Per se*, timelines do not define the objective and goals of a project. They can in fact be altered so that the substantive goals of a project are met. The ultimate goal of running an election is to produce results that are accepted by the people. In order to meet this goal, not only must the election be accurate and precise; the electoral process must be transparent and credible. In elections, processes are as important as the results. Open competitive bidding provides transparency in the procurement process. Instructive are the words in the introductory portion of a guidebook on the use of electronic voting³, to wit:

A key theme in this guide is that transparency and openness are essential to successful consideration and implementation of electronic voting and counting technologies. Change can be unsettling, and it is crucial that stakeholders trust the electoral process. When decisions are taken behind closed doors without involving stakeholders, the rationale for those decisions will not be clear and stakeholders will naturally question who the change is intended to benefit. This can lead to erosion of trust in the process and severely undermine the credibility of the elections and the elected institutions.

I must therefore register my dissent to the majority's position on this issue. gml


LUJÉ TITO F. GUIA
Commissioner

³Goldsmith, Ben. *Electronic Voting and Counting Technologies*. Washington, DC, USA: International Foundation for Electoral System, 2011.